No. 83

Brf. of Spalding & Post for Pltf. in Err.

Supreme Court
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JAMES H. McKENNEY
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SUPREME COURT OF THE UNITED STATES.

Filed Dec. 6. 1901.

EDWARD W. VOIGT
Plaintiff in Error,

vs.

THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes,
Defendants in Error.

No. ~~15,000~~ 83.

Error to the Supreme Court of the State of Michigan.

BRIEF OF H. E. SPALDING, COUNSEL FOR PLAINTIFF IN ERROR.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

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BRIEF OF H. E. SPALDING, COUNSEL FOR PLAINTIFF IN ERROR.

This is a writ of error to the Supreme Court of the State of Michigan to review its decision sustaining a special assessment laid upon lands of Mr. Voigt, in the City of Detroit, to defray part of the expense of opening a public street. The assessment was attacked upon the ground that the proceedings taken therefor and the statute authorizing those proceedings violated that part of the Fourteenth Amendment to the Constitution of the United States, which forbids any State to deprive any person of property without due process of law.

The statute in question is the act authorizing cities and villages to take private property for public use by condemnation proceedings.

1 Mich. Comp. Laws of 1897, Secs. 3392-3435.

This Act provides for judicial proceedings in which the necessity of taking any property sought to be acquired for public purposes and the compensation to be paid therefor are determined by the verdict of a jury. To these proceedings the municipality and those interested in the property to be taken are the only parties. The compensation awarded is paid by the municipality.

The part of the law attacked is the provision for reimbursement of the municipality, which is as follows: "If the Common Council, or Board of Trustees, or Board of Supervisors, believe that a portion of the city, village or county in the vicinity of the proposed improvement, will be benefited by such improvement, they may by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city, (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly as may, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the Common Council, Board of Trustees or Board of Supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county."

1 Comp. L. of 1897, Sec. 3406.

Mr. Voigt filed a bill on the equity side of the State court of original jurisdiction to set aside and annul a street opening assessment made on his lands under this Act. The case comes up upon a demurrer to the bill for lack of equity, and a decree sustaining the demurrer and dismissing the bill.

It appears by the bill that the City of Detroit opened a street known as Second avenue by condemnation proceedings, in which the amount awarded was about $74,000. This street was already open through Mr. Voigt's lands by

his dedication. Acting under the section of the statute above quoted, the Common Council determined, by resolution, that there should be assessed upon a local assessment district established by the same resolution, the sum of $49,155.12 as "a just proportion of the compensation awarded by the jury which should be paid by the owners" of the property in the assessment district. This district includes the lands of Mr. Voigt. He had no notice of these proceedings of the council and no opportunity of hearing upon the determination of the limits of the district, the inclusion of his property therein, and the amount to be assessed upon the district. Of the total amount imposed upon the district by the determination of the council $9,951 was apportioned to and assessed upon his lands by the Board of Assessors.

It is admitted that these proceedings comply with the statute.

The errors on which we rely are:

1. That the Supreme Court of Michigan erred in sustaining the statutory provisions above cited against the objection that they are repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they provide for the taking of property without due process of law.

2. That said court erred in sustaining the assessment proceedings under said statutory provisions against the objection that they are repugnant to the said constitutional amendment, in that they amount to a taking of property without due process of law. (Record, pp. 15, 16.)

ARGUMENT.

Under the statute, the council determine according to their own discretion, finally and without giving notice or opportunity of hearing to any of the parties interested:

(a) What property is specially benefited by the improvement and what is not.

(b) Whether the whole, and if not the whole, what part, of the cost of the improvement shall be borne by the property benefited.

The assessors merely apportion the amount so determined upon the several parcels of land in the prescribed district in proportion to benefits.

The owner has an opportunity of hearing before the assessors, but only upon the question of apportionment.

He may show that his lot is assessed in an undue proportion as compared with the others, but nothing else.

Though it could be demonstrated that property specially benefited has been omitted from the district, that the amount assessed exceeds the entire benefit to the district, and that every lot is assessed for more than its benefit, these questions are concluded by the ex parte determination of the council.

The objections to the Act are two.

First. That it does not afford to the property owner notice and opportunity of hearing upon the questions of what lands, if any, are specially benefited by the improvement, and therefore to be included in the assessment district, and what is the amount of the special benefit, and therefore the maximum amount to be paid by the district.

Second. That it does not require the amount imposed upon the district to be limited to the amount of special benefit.

I submit upon the first question this proposition.

The function of the council in determining whether any and what property is especially benefited by the improvement and the amount of the benefit is not legislative, but quasi-judicial, and cannot constitutionally be exercised without notice and opportunity of hearing to the property owners upon the several matters to be determined.

That the basis of special assessments is special local benefit, and that such assessmnets are to be in proportion to and not in excess of such benefits is indisputable. The law must, therefore, provide means to insure that all the property benefited, and none other shall be assessed and that assessments shall not exceed benefits. The points in contest have been and are, by what authorities and under what safeguards for individual rights may the questions of benefit constitutionally be determined.

It is said by Judge Cooley, in an often quoted opinion upon special assessments, "that parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage of the proceedings before the tax shall become an established charge against them or their property."

Thomas vs. Gain, 35 Mich., 135, 164.

A hearing, then, of some sort is a constitutional requirement. The question is upon what the party is to be heard. As the object of the hearing is protection against an unwarrantable or excessive imposition, that hearing should

be upon all matters necessary to make such protection adequate, that is, upon all the points involved in determining the amount of the assessment.

The property owner is interested in three things:

First, the size of the district—to see that his property be not included unless specially benefited, and if it be included, that all other property similarly benefited be also included.

Second, the amount of the total assessment—to the end that the district be not assessed in excess of its benefits.

Third, and after the settlement of the first two questions, he is interested in the apportionment of the amount upon the district— to the end that his assessment be not disproportionate to that of the other property owners. The statute here in question provides a hearing upon the last, but denies him the right to be heard on either of the first two points.

All of the important decisions of this court were reviewed in the cases of *Norwood vs. Baker*, 172 U. S., 269; *French vs. Barber Asphalt Co.*, 181 U. S., 324, and *Wight vs. Davidson*, 181 U. S., 371.

The first of these cases was upon a street opening assessment made under a statute giving the council discretionary power to defray the cost of street improvements wholly or in part by general taxation, and to impose so much thereof as is not raised by general tax upon the benefited property, whether abutting or not, either in proportion to benefits or according to value or by the front foot. The assessment complained of was made under a village ordinance directing the assessment in this case to be made on the abutting property by the front foot. The effect was to impose on the property owner, without opportunity of hearing, the entire amount received for the land previously taken, plus the expense of condemnation. The choice of methods given the council was exercised without hearing; but it will be observed that the State legislature had not made any determination, general or specific, that the frontage rule should be followed.

In *French vs. Barber Asphalt Co.* the legislature had determined by the city charter that street paving should be paid for by assessment upon the abutting property by the front foot. An assessment so made was sustained, as it appeared that the pavement was uniform in character and quality and the abutting lots in value.

Wight vs. Davidson arose on a special Act of Congress, providing for opening a street in the District of Columbia by judicial proceedings, and the assessment of at least one-half the expense by a jury upon the property found to be benefited. All persons assessed had notice by publication of the proceedings, and opportunity to be heard therein. The assessment was sustained on the ground that it was within the legislative power of Congress to determine the amount of the special benefit from opening the street and require it to be paid by the benefited property.

I understand the following points to be determined by these cases.

1. That in absence of a determination by the State legislature a municipal council may not impose the cost of a street improvement upon the abutting property in proportion to frontage without affording to the owners an opportunity of hearing on the question of benefits.

2. That the legislature may require the whole or any part of the expense of a street improvement such as paving to be defrayed by assessment upon the abutting property in proportion to frontage.

3. That the legislature may require the whole or any part of the expense of a local improvement, such as a street opening, to be defrayed by assessment upon the property benefited in proportion to benefits.

The questions open under these cases and here material are:

(a) Whether the fact that the apportionment upon the district is to be made according to benefits instead of frontage avoids the necessity of giving a hearing to parties in interest on the preliminary questions of what property is benefited and how much.

(b) Whether the determination by a municipal council of what property is specially benefited and the amount of benefit without hearing the parties in interest is equally conclusive as is a like determination by the legislature.

No question of the effect of a legislative determination of property benefited and amount of benefit arises. The legislature determined nothing by the Act here in question, except that the apportionment upon the district should be in proportion to benefits. All other questions are remitted to the discretion of the Common Council.

It may be suggested that the ground of decision in *Norwood vs. Baker* was that the discretionary power of assessment was there abused by imposing an assessment substantially exceeding the special benefit, and that the case is,

therefore, consistent with the existence of general power in a municipal council to make such assessments by frontage without hearing those interested. On this theory every case would turn on the question whether there was or was not an assessment in substantial excess of benefit, and proof of such excess would be necessary to relief. But, while on the facts in *Norwood vs. Baker* an excess appeared probable, the complainant did not show nor offer to show that the assessment, in fact, exceeded benefits, but attacked the proceedings because they were taken without inquiry as to benefits, and that the entire assessment was illegal.

Opinion, pp. 290-1, 293-297.
Dissenting opinion, pp. 300-302.

In *Wight vs. Davidson*, decided with *French vs. Barber Asphalt Co.*, it was said of the Norwood case that "there having been no legislative determination as to what lands were benefited, no inquiry by the village council and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefit * * * is to the extent of such excess a taking * * * without compensation and accordingly affirmed the decree" setting aside the assessment.

See Opinion, pp. 384-5.

This sufficiently shows that the decision was based on the violation of principle in assessing without hearing.

The individual property owner is interested in the determination of every question that affects the amount of his assessment. Where the apportionment is according to benefits, these questions are

1. What property is specially benefited by the improvement.

2. What is the gross benefit to all property specially benefited.

3. What proportion of this gross benefit accrues to the individual piece of property.

Each of these questions is one of fact to be determined upon evidence of the situation and condition of individual pieces of property in the locality of the improvement, and the effect of the improvement upon each. Upon each question an opportunity of hearing is important to the owner.

The fact that the apportionment is to be by benefits instead of by frontage renders a hearing necessary on relative benefits, but does not lessen the importance of a hearing on the other questions. All who are charged may be overburdened, and some property chargeable may escape, though as between those charged the load may be equitably distributed.

The frontage rule of apportionment may be—in most cases of improvement to an existing street is—a just rule, benefits usually being substantially proportionate to frontage. Had the apportionment in the Norwood case been according to benefits instead of frontage, the result would have been practically the same. It is clear that the fact that the frontage rule had been there adopted was without significance.

The question, then, is whether a municipal council can constitutionally be empowered to determine, without hearing the parties in interest, what property is specifically benefited and how much, and accordingly, what proportion of the cost of the improvement shall be borne by such property. This depends upon whether the determination is an act of legislative power.

Upon principle it is not, but quasi-judicial. The constitutional justification for special assessments being that they depend upon and cannot exceed special benefits, the determination rests not on considerations of public policy as do the levying of general taxes and the apportionment of public burdens among the constituent parts of the general body politic, but upon the local effects, absolute and relative, of a particular improvement upon specific individual properties. It is the right of each local proprietor not to be assessed unless benefited, nor beyond his benefit, nor disproportionately to others, and that the burden should be apportioned upon all similarly situated. In each case the question is one of private right and distributive justice. It is to be observed also that, while in questions of general taxation the legislature has absolute discretion in fixing the amount of revenue and the sources from which it is to be derived, yet before a tax can become an established charge against an individual he has a constitutional right to be heard on all matters by which he is peculiarly affected, for example, the valuation of his property.

Cooley on Taxation, 361-3.

And it is for this reason that the distinction is taken on the right of hearing between specific taxes and those based on valuation.

Hagar vs. Reclamation District, 111 U. S., see 709-710.

Conceding for the purpose of this argument that a like determination by the State legislature is conclusive, that is because when a discretion is vested in the legislature its review by the courts, whether the power be legislative in character or not, is thought to involve an encroachment by the judicial upon the legislative department. This consideration does not apply where the power is vested in a local municipal body.

It is settled that if such a power be vested in a body which has not the legislative function, it is quasi judicial, and therefore can only be exercised after notice and opportunity for hearing to all affected by the exercise.

Where the legislature delegates to a board or officer a duty involving discretion and affecting individual rights, notice is required, though the legislature itself might have acted without.

Re Currie, 54 N. Y. Supp., 917.
Parsons vs. District of Columbia, 170 U. S., 45, 52.

This is recognized in

Spencer vs. Merchant, 125 U. S., 345, 356.

"Wherever the principle is adopted that assessments for local improvements can be justified only to the extent of special benefits actually received and must be apportioned accordingly, or wherever the apportionment or its basis has not been fixed by the legislature, although within its competency to do so, in either case the question of the existence and the extent of benefits becomes in its nature judicial, and not merely administrative, in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard."

2 Dill. Mun. Corp., Sec. 802a.

Due process of law "must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

Hagar vs. Reclamation District, 111 U. S., 708.

Hearing is equally needful for protection whether private rights are to be affected by the decision of a Common Council or by that of a purely administrative board or officer.

The character of the power remains the same wherever vested.

This was recognized when the question was on the power of the board of supervisors of the city and county of San Francisco to fix water rates to be charged by a private corporation in

> Spring Valley Water Works vs. Shottler, 110 U. S., 347,

the court saying: "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature." (See p. 354.) This Board of Supervisors was the local legislative body.

> See acts collected 4 Deering's Annotated Codes and Statutes of California: Penal Code and Statutes in Force, under head "San Francisco City and County," p. 667.

In *Fallbrook Irrigation District vs. Bradley, 164 U. S., 112*, an irrigation act of the State of California was attacked as not permitting those whose lands were sought to be included in the assessment district to be heard on the question whether they were benefited before the Board of County Supervisors who established the district. The court, while holding that the principle contended for did not apply because such hearing was provided, conceded that it was sound, saying that the legislature has power to fix such a district for itself without any hearing as to benefits. "But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some *tribunal* (the Board of Supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the land-owner has the right to be heard upon that question before his property can be taken." (See pp. 174,-75, also p. 169.)

The Board of Supervisors is in California the legislative body of the county.

Constitution of California, Act. 14, Sec. 1.
Deering's Political Code of California, Sec. 4022 et seq. especially Secs. 4045, 4046.

Though it also has certain administrative and judicial powers.

People vs. Supervisors, 8 Cal., 58.
Waugh vs. Chauncey, 13 Cal., 11.
Sewer Dist. vs. Farmer, 101 Cal., 178.
Belser vs. Hoffschnider, 104 Cal., 455.

Clearly it does not follow that a power is legislative because it is vested in a body having some legislative power. The procedure and safeguards necessary to the constitutional exercise of a power are to be determined from the character of the power itself, not from that of its depositary. The governing body of a municipality, usually called the Common Council, exercises in general all the powers of the incorporated place.

1 Dill Mun. Corpn., Sec. 242.

It has, in the absence of restraint, an implied power to amove corporate officers whether elected by itself or by the people.

Ibid, Sec. 243.

So a charter provision vesting in the board of Aldermen power to try impeachments of city officers is not unconstitutional as authorizing the exercise of judicial power.

Ibid, Sec. 244, and cases cited.

The Common Council of the City of Detroit, like common councils generally, and like the Board of Supervisors in California, is a body exercising powers of different classes, legislative, administrative and quasi-judicial. Its charter (Local Acts of the State of Michigan of 1883, p. 579) contains, among others, the following provisions:

The powers of local government possessed by the city are divided into two departments, the legislative and administrative. No person or body belonging to one department shall exercise powers properly belonging to the other, except in cases expressly provided for in this Act. (Chap. 1, Sec. 2).

The Common Council has the legislative power of the city. (Chap. 7, Sec. 1.)

It has, among other powers not of a legislative nature, the following: On the Mayor's nomination it appoints the board of assessors, controller, board of public works, and members of other city commissions. (Chap. 4, Sec. 2.) Without the concurrence of any other city officer, it appoints market clerks, pound masters, election inspectors and others. (Chap. 4, Sec. 3.)

By a two-thirds vote it may remove, on charges made and after hearing in defense, any elective officer of the city, except the Mayor of the city and recorder, for malfeasance in office or neglect of duty. Provision is made for trial of such charges before the council and for compulsory attendance of witnesses. (Chap. 4, Sec. 18.)

It determines appeals taken by persons considering themselves aggrieved from assessments determining valuations for taxation made by the Board of Assessors. On such appeal the council may increase or diminish the assessment as they see fit, but shall not increase without opportunity for hearing to the persons affected. (Chap. 10, Secs. 7 and 8.) See upon the character of the above proceeding

Michigan Savings Bank vs. Detroit, 107 Mich., 246.

Detroit Savings Bank vs. Detroit, 114 Mich., 81.

It may order the taking down of buildings in its opinion unsafe, and in default thereof cause a removal by the city. (Chap. 5, Sec. 16.)

It may abate and remove a nuisance, and for that purpose, in its discretion, fill up and level or drain any lot or premsies. (Chap. 7, Sec. 42.)

It audits and allows all claims against the city. No action can be brought against the city unless the claim has been previously presented to the council. (Chap. 5, Sec. 17.)

Springer vs. Detroit, 102 Mich., 300.

No contract for any work or supplies for the city can be made without its approval and confirmation. (Chap. 11, Sec. 8.)

It has control of all corporate property with power to lease, sell and convey it, and may purchase real estate for corporate use. (Chap. 7, Secs. 23 and 411.)

When a power judicial in its nature is vested in a body of this character, exercising power belonging to all three departments of government, it is not reasonable to hold that such judicial power can be exercised without judicial safeguards.

If the above statement from the opinion in the Fallbrook case be correct, such a power cannot be constitutionally exercised by any body having legislative powers except the State legislature without opportunity of hearing to the land owner. The same passage was cited with approval in *French vs. Barber Asphalt Co.*

It may be said that these statements quoted from the decisions of this court were not essential to the decisions. Their principle, however, which is that of the proposition we maintain, is necessarily implied in the decision of the Norwood case, whether that case is taken as interpreted either by the majority or by the minority of the court in *French vs. Asphalt Co.* and *Wight vs. Davidson.*

In the Norwood case the legislature had determined nothing, but had given the village council power to defray the cost of street improvements, either by general taxation, a special assessment, or partly by each method. In case of special assessment, it might assess by benefits, value or frontage, and upon all property benefited or upon the property abutting only. The council did determine to assess the whole cost by frontage on abutting property.

This decision is evidently inconsistent with the theory of conclusive legislative determination by a municipal council. It is claimed by the dissenting opinion in *French vs. Asphalt Co.* to be authority for the proposition that even a State legislature may not conclude the property owner by a determination that the entire cost of an improvement shall be borne by the property in the locality without inquiry as to benefits. The court holds, however, in the French case that the State legislature may require the cost of a local improvement to be assessed against abutting property without hearing on benefits. In *Wight vs. Davidson* the same majority who decide the French case, affirming the same rule as to the legislative power of Congress, distinguish the Norwood case, because in that case there had been no legislative determination as to what lands were benefited, and no inquiry made by the village council and no opportunity afforded the abutting owner to be heard on that subject.

Opinion of Court, 384-5; Dissenting Opinion, 387.

A municipal council, then, like any other tribunal upon which the power to determine the lands benefited and the amount of benefit is conferred by the legislature, does not, in making that determination, exercise legislative power, and must give the property owner interested notice and an opportunity of hearing on the questions involved.

The statute does not require the amount imposed on the district by the council to be limited to the amount of special benefit. It provides that if the Common Council believe that a local district is benefited, they may determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the real estate deemed to be thus benefited.

The Supreme Court of Michigan construed this provision as limiting the assessment to the benefit, apparently because the amount fixed by the council is to be apportioned among the several parcels of land in the district in proportion to the advantages they acquire from the improvement. (Record, pp. 11, 12.)

That special benefit is the constitutional limit of special assessment, see *Norwood vs. Baker, 172 U. S., 269.*

As no such limitation is expressed, the question is whether it is fairly implied.

Under the statute, the right to impose a special assessment is predicated upon the belief of the council that a part of the city in the vicinity of the improvement will be benefited by the improvement. This authorizes a special assessment where there is no other benefit than that common to the general public. So the apportionment upon the district is to be in proportion to the advantage which the lots are deemed to acquire, without limitation to special advantage.

The amount which the council may require to be specially assessed is "any just proportion" of the entire award. What the just proportion is the council is to determine. Is it the same thing to empower them to impose what they deem as between the city and the assessment district a just proportion, and to impose an amount not exceeding the special benefit to the district? The limitation to "any just proportion" fixes no standard of determination. It leaves it in each case to the uncertain fluctuations of individual opinion unguided and unchecked.

In a case where the Common Council were empowered to construct sidewalks and assess upon the owners of the abutting property so much of the expense as the council should deem just and equitable, the statute was held unconstitutional, because the limitation to the proportion of expense deemed just and equitable by the council did not import with reasonable certainty a limitation to the amount of the benefit. The court say that for the protection of the taxpayer's constitutional rights the statute should fix such a standard of assessment, and that as it

does not, it cannot be determined upon what basis the council proceeds.

Barnes vs. Dyer, 56 Vt., 469.

A statute authorizing sewer commissioners, after ascertaining the cost of the sewer, to assess it against the parcels drained in such proportion as they deem just and equitable, was held unconstitutional on the same ground.

New Brunswick Rubber Co. vs. Commissioners, 38 N. J. L., 190.

So the provision of a liquor law allowing a local board to refuse approval of a bond, tendered by any person whose character and habits in their opinion rendered him unfit to conduct the liquor business, was held bad. The court say "where there is no standard laid down, there may be as many scales of fitness and unfitness as there are boards. * * * If the statute had fixed the rule, there would be means of protecting parties against caprice and condemnation unheard, but when the same persons are to be judges of the proper causes of rejection as well as of the fitness of persons under such causes, the law subjects every one to the mere will of his neighbors and gives him no rights whatever. No man's rights can be submitted under a constitutional government to the discretion of any body."

Robinson vs. Miner, 68 Mich., 549, see pp. 555, 556.

I submit that the decision of the Supreme Court of Michigan should be reversed and a decree entered in accordance with the prayer of the bill.

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